IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5164 OF 2005.

Sou. Indumati Bhimrao Patil ..Petitioner

versus

Bhimrao Baburao & Babgonda Patil ..Respondent.

Mr. Tejpal S. Ingale for the Petitioner

Mr. A.a.Garse for the Respondent No.1

Coram : S.R.Sathe, J.
Dated : 6th Feb., 2006

P.C.

1. Rule. Returnable forthwith.

2. Heard both the learned Advocates.

3. As the application filed by plaintiff for amendment in the plaint vide Exhibit 96 was rejected, she has filed the present petition.

4. The plaintiff filed suit for partition against her husband and her step sons alleging that when she was residing at her husband’s house he never cared for her maintenance and drove her out of the house. She filed criminal application under Section 125 of Cr.P.C. and maintenance was granted. With a view to avoid maintenance the defendant No.1,

partitioned his ancestral suit properties and some of the properties were given to the share of petitioner's step sons. According to her, as no share was alloted to her to which she was entitled as per Hindu Law, the said partition is not legal and valid. In that suit though she had alleged that she has a right to maintenance and to defeat that right plaintiffs and other defendants partitioned the property, she did not specifically claim any maintenance. Hence by virtue of Exhibit 96 she prayed that she be allowed to amend the plaint and in case it is held that she is not entitled for partition then maintenance be awarded to her and charge of the same be kept on the suit property.

4. The said application was opposed by the defendant on the ground that the plaintiff tried to make out new and inconsistent case at late stage.

5. Accepting the argument of the learned Advocate for the defendants and holding that the suit for partition was not maintainable lower court held that amendment cannot be allowed.

6. Being aggrieved by that order, plaintiff has filed the present petition.

7. From the perusal of the order passed by the trial judge, it is very clear that he proceeded solely on the basis that it was a suit for partition in respect of self acquired property of plaintiff's husband. In fact there are clear pleadings to the effect that the suit property is the ancestral property and the plaintiff's husband and her step sons have partitioned the said property only with a view to deprive her from getting any maintenance or share. According to her at the time of partition between father and sons no share was allotted to her. Hence, she is asking for her share. So, under the circumstances, it was not proper on the part of trial court to come to hasty conclusion that the suit itself is not maintainable. Looking to the proposed amendment it cannot be said that the plaintiff is trying to make out totally new or inconsistent case. By way of alternate plea she has prayed that in case it is held that she is not entitled for a share, then she be granted maintenance and charge of the same be kept on the suit property. This is certainly not an after thought. Nor it can be said that the plaintiff tried to make out new and inconsistent case. In order to determine the real controversy between the

parties once for all, it is necessary to allow the plaintiff to amend his plaint as prayed.

7. The order passed by the trial judge is not legal and correct. Hence the same is set aside. The application for amendment Exhibit 96 is allowed. The plaintiff to carry out the amendment in the plaint within three weeks from the receipt of this order by the trial court and then the trial court to dispose of the suit according to law.

. Rule made absolute.

(S.R.Sathe, J.)